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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1782

ARTHUR ANDERSEN & CO.,
Petitioner,

v.

STATE OF OHIO, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

Page

Table of Authorities iii

Opinions Below 1

Jurisdiction 1

Questions Presented 1

Statement 2

Argument 9

I. ANDERSEN'S PETITION RESTS WHOLLY UPON RENEWED OBJECTIONS TO THE DISTRICT COURT'S FINDING OF ANDERSEN'S BAD FAITH, A FINDING WHICH THE CIRCUIT COURT UPHELD BASED ON "OVERWHELMING SUPPORT IN THE RECORD" 9

II. NO NOVEL OR BROADLY APPLICABLE QUESTION IS RAISED BY THE PARTICULAR SANCTIONS IMPOSED UPON ANDERSEN; THESE NECESSARILY DEPEND UPON THE FACTS OF THIS CASE AND ARE JUSTIFIED BY PRINCIPLES WHICH THIS COURT ESTABLISHED IN *SOCIETÉ INTERNATIONALE* v. *ROGERS* AND CONFIRMED IN THE *NATIONAL HOCKEY LEAGUE* CASE 13

III. NO CONFLICT AMONG CIRCUITS IS PRESENTED BY THE CASES ANDERSEN CITES; INDEED, THOSE CASES ARE IRRELEVANT HERE, AND OTHERS WHICH ANDERSEN DOES NOT MENTION STRONGLY SUPPORT THE OPINIONS BELOW 16

Conclusion 19

APPENDICES

		Page
Appendix A.	Order of the United States District Court for the District of Colorado, July 2, 1976	20
Appendix B.	One of Documents Edited by Andersen Before Production to Ohio, Produced on August 13, 1976	26

TABLE OF AUTHORITIES

Cases

	Page
Arthur Andersen & Co. v. *Finesilver*, 546 F.2d 338 (10th Cir. 1976), *cert. denied sub nom. Arthur Andersen & Co.* v. *Ohio, et al.*, 429 U.S. 1096 (1977)	8
Diapulse Corp. of America v. *Curtis Publishing Co.*, 374 F.2d 442 (2d Cir. 1967)	18
Margoles v. *Alida Johns and The Journal Company*, unpublished, No. 76-1293 (7th Cir., October 14, 1976)	18
National Hockey League v. *Metropolitan Hockey Club*, 427 U.S. 639 (1976)	15
Perry v. *Golub*, 74 F.R.D. 360 (N.D. Ala. 1976)	18
Societé Internationale v. *Rogers*, 357 U.S. 197 (1958)	9, 16
State of Ohio v. *Crofters, Inc.*, 75 F.R.D. 12 (D. Colo. 1977), *aff'd sub nom. State of Ohio* v. *Arthur Andersen & Co.*, 570 F.2d 1370 (10th Cir. 1978)	2, 3, 9, 14, 15
State of Ohio v. *Arthur Andersen & Co.*, 570 F.2d 1370 (10th Cir. 1978), *rehearing denied*, March 22, 1978	9, 10, 11, 16
United States v. *First National City Bank*, 396 F.2d 897 (2d Cir. 1968)	16

Rules

Fed. R. Civ. P. 1	14
Fed. R. Civ. P. 37	1, 2, 3, 9, 14, 15, 16, 18

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OPINIONS BELOW

The opinion of the United States District Court for the District of Colorado is reported at 75 F.R.D. 12, and is printed in petitioner's Supplemental Appendix, S-17. The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 570 F.2d 1370, and is printed in petitioner's Supplemental Appendix, S-1.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether a federal district court acts within its discretion under Federal Rule 37 when, after detailed consideration of a 3,000 page record, it imposes sanctions upon a party which has used "foreign law" as a diversionary

tactic to thwart lawful discovery orders while repeatedly misrepresenting its own conduct both to its opponent and to the federal court?

2. Whether a party which engages for at least 18 months in what the courts below found was a "willful and flagrant scheme of delay and resistance in discovery matters" may avoid sanctions provided by Rule 37 merely by yielding, months after a thrice-postponed discovery deadline, the material which it had been ordered to produce?

STATEMENT

At issue in this petition is an opinion and judgment of the United States Court of Appeals for the Tenth Circuit affirming an order entered by the United States District Court for the District of Colorado, imposing sanctions against petitioner Arthur Andersen & Co. ("Andersen") pursuant to Rule 37 of the Federal Rules of Civil Procedure. *State of Ohio* v. *Crofters, Inc.*, 75 F.R.D. 12 (D. Colo. 1977), *aff'd sub nom. State of Ohio* v. *Arthur Andersen & Co.*, 570 F.2d 1370 (10th Cir. 1978). The district court's 24-page order finds as a fact an 18-month pattern of willful, flagrant disobedience by Andersen of discovery requests and discovery orders, including intentional withholding of documents on grounds of Swiss secrecy when the documents were known by Andersen not to be secret, obstruction and delay of discovery in bad faith for purely tactical purposes, improper editing of documents prior to production, and repeated, deliberate and material misrepresentation to plaintiff State of Ohio ("Ohio") and to the federal district court. The order concludes:

> "We find willful and flagrant bad faith and a callous disregard of counsel's responsibilities . . . In sum, we find that (a) the materials sought by Ohio from Andersen were relevant to the issues in the suit; (b) Andersen had the ability to expeditiously comply with Ohio's discovery request; (c) a court order was entered directing Andersen to exert every effort to comply with the discovery requests; and (d) Andersen deliberately and willfully refused discovery for an unreasonable period of time without justification."

75 F.R.D. at 20.

Holding that Andersen's prolonged disobedience would fully justify entry of a default judgment, the court instead precludes Andersen from opposing at trial two of Ohio's factual contentions and directs Andersen to reimburse Ohio's reasonable expenses and attorney's fees incurred in obtaining compliance with the court's orders. 75 F.R.D. at 25.

Review of a district court's exercise of its discretion under Rule 37 depends significantly upon the particular facts which confronted that court. Although the circumstances leading to the court's imposition of sanctions are reviewed in the opinions below, the pertinent background is again summarized here because Andersen's petition is expressly premised upon assertions of "erroneous basic conclusions" by the district court and by the Tenth Circuit. (Petition, p. 10).

Ohio's Complaint in *State of Ohio* v. *Crofters Inc.*, et al., was filed on April 17, 1972. Ohio's allegations against Andersen relate to Ohio's purchase in the Spring of 1970 of $8,000,000 in securities of King Resources Company ("KRC"). The securities were never redeemed, and KRC subsequently filed a petition in bankruptcy.

More specifically, the Complaint alleges that in auditing the financial statements of KRC for 1968 and 1969, and in rendering an unqualified opinion that those statements constituted a fair financial presentation, Andersen fraudulently misrepresented the financial condition of KRC, in violation of the federal securities laws and of the statutory and common law of the State of Ohio. Ohio asserts that those financial statements, upon which it relied in purchasing the KRC securities, misrepresented KRC's finan-

cial position in that, among other things, they failed to disclose the extent of KRC's dependence upon a principal customer, failed to disclose that the customer was approaching financial collapse, that KRC had embarked on a costly and risky attempt to take control of and rescue the customer, and that the customer was The Fund of Funds, Ltd. ("FOF"), a nonresident offshore Canadian mutual fund controlled by Investors Overseas Services, Ltd. ("IOS"), another nonresident Canadian corporation.

FOF and IOS maintained their principal offices in or near Geneva, Switzerland. Both had been forbidden by a 1967 order of the Securities and Exchange Commission from doing business within the Commission's jurisdiction. Financial statements of both were audited by Andersen.

When, after a protracted stay, significant discovery in the lawsuit began in October of 1975, Ohio requested Andersen to produce documents pertaining to Andersen's audit services for IOS and to provide certain information concerning Andersen's knowledge of the IOS-KRC relationship during the period when Andersen was auditing the 1968 and 1969 KRC financials. These requests (the document request was later narrowed; the interrogatories were never changed) eventually became the basis for the district court's Rule 37 orders compelling discovery and, finally, for the sanctions now at issue.

In objecting to these discovery requests by Ohio in the Fall of 1975, Andersen raised the "foreign law issue," which soon became the theme of Andersen's prolonged opposition to discovery requests and discovery orders concerning information and material at its Geneva, Switzerland offices.

Throughout the ensuing controversy concerning what the parties usually referred to as the "Geneva documents," Andersen declared repeatedly and without qualification that if it were compelled to produce the requested documents or information this would violate the secrecy laws

of Switzerland and would subject the personnel of Andersen's Swiss offices to criminal and civil sanctions.

During the next seven months, from October of 1975 to April of 1976, the court monitored the controversy, and intervened where necessary, frequently emphasizing its concern that both Ohio and Andersen must present a proper factual foundation for all discovery motions.

In April of 1976, Ohio filed a motion relating specifically to the matter of discovery of documents and information in Andersen's Geneva offices concerning IOS and the relationship between IOS and KRC. Andersen objected to the motion, and attached to its opposition an opinion of its Geneva lawyers, which it had received about one month earlier, discussing various anti-disclosure prohibitions of Swiss law and describing penalties for their violation. The opinion did not address the applicability of any particular Swiss legal prohibition to any particular documents possessed by Andersen or sought by Ohio.

Upon receiving Andersen's opposition, Ohio immediately contacted several of the major entities whose consent would, according to the opinion of Andersen's Swiss lawyers, assist in effecting production of the Geneva documents. By May 20, 1976, one month after filing its motion to compel, Ohio had supplied to Andersen copies of the consents Ohio had obtained; Andersen replied only that the "purported" consents might well be invalid, and that the court could afford them no weight unless Andersen's Swiss lawyers assented. Andersen also told Ohio and the court that in any event these consents could "by no stretch of the imagination" protect Andersen from Swiss legal penalties and that "a *sine qua non* of such protection" would be the consents of both the Swiss Federal Prosecutor and the Geneva Prosecutor.

On May 26, 1976, the district court, declaring that it was "satisfied that the plaintiff has made a good showing for the discovery of these items in the Geneva office," granted Ohio's motion.

Three weeks passed. At the end of that time, during which Andersen produced none of the requested documents and none of the requested information, Andersen told the court that it had been "caught by surprise" by the court's order to produce the documents and that it would need more time to consider the "ramifications" of the order. Also, Andersen stated that it would have to determine the effect of what it had earlier called the "purported" consents furnished by Ohio, and to determine whether any of the Geneva documents could be made available to Ohio without violating Swiss law. To accomplish this, Andersen said, it would now need to find out what documents existed at its Geneva office, something it had never attempted to do during the months in which it had been declaring its inability to comply and its certain jeopardy under Swiss law. Andersen reported that one of its Denver counsel would be leaving that day, June 17, 1976, to consult with Andersen's lawyers in Switzerland, and to begin, *for the first time*, an examination of the documents in Geneva.

Responding to Andersen's claims of surprise, the district court directed Ohio and Andersen to meet together to try to agreee upon a modified procedure that would resolve the dispute. In two such meetings, Ohio proposed that Andersen enter into an agreed modified order that would require Andersen only to "exert every effort" to effect production of documents whose disclosure Andersen believed to be precluded by Swiss law. When Andersen flatly rejected this proposal, Ohio independently submitted such an order to the court. On July 2, 1976 the court withdrew its initial order and essentially adopted Ohio's proposal, an order that Andersen "exert every effort" to produce the Geneva documents. (The July 2, 1976 Order is printed below in Appendix A, p. 20.)

A week later, Andersen advised the court that its review of the documents in its Geneva office had revealed that there were only 220 documents which pertained to Ohio's requests and that, because of the consents earlier supplied

by Ohio, Andersen could produce in the week of July 12 what it had determined to be the "responsive portions" of 190 of those documents.

The week of July 12 passed. No documents were produced. No interrogatories were answered. Instead, Andersen delivered to Ohio a "protective order" to which it demanded Ohio's agreement before Andersen would produce what it referred to as the "redacted" documents, even though those documents concededly contained no Swiss "business secrets." (One such "redacted" document is reproduced below in Appendix B, p. 26.)

No documents were produced until July 22, 1976, when, three hours before a scheduled hearing on sanctions and seven weeks after the court had granted Ohio's motion to compel, Andersen delivered to the office of counsel for Ohio a list of 30 documents which it refused to produce, a five-page submission of partial answers to interrogatories, and 80 newspaper clippings. At the hearing that afternoon, counsel for Andersen conceded that the "protective order" which Andersen had insisted upon had in fact been unnecessary, and stated that the reason why Andersen had withheld until that morning documents which it knew to contain no business secrets was that counsel was "not focusing" on delay as a problem.

The court, nevertheless, imposed no sanctions; it indicated its extreme reluctance to do so, and stated it would take that matter under advisement. At a hearing the next morning, the court postponed for the third time, to August 20, 1976, the deadline for Andersen's compliance with Ohio's discovery requests. The court said that it was "not enamored" with Andersen's approach to Swiss law, and observed that it had been considering, but was withholding, the appointment of an expert on Swiss law to testify on this matter.

Andersen did not thereafter seek appointment of such an expert. Instead, it appealed to the United States Court of

Appeals for the Tenth Circuit from each of the district court's three orders relating to production of the Geneva documents.

In December of 1976, the Tenth Circuit upheld the challenged orders, observing that it was not impressed by Andersen's contentions with respect to alleged requirements of foreign law and international comity, and pointedly advising that if such a problem existed, "Andersen should call the matter to the attention of those officers and agencies of the United States charged with the conduct of foreign affairs, and they could make such representation to the Court as they deemed suitable. Andersen has not taken this action. Instead, it purports to speak for the United States." *Arthur Andersen & Co.* v. *Finesilver*, 546 F.2d 338, 342 (10th Cir. 1976), *cert. denied sub nom*, *Arthur Andersen & Co.* v. *Ohio, et al.*, 429 U.S. 1096 (1977).

During a period of approximately eight months after the court's August 20 deadline, Ohio received from Andersen edited portions of documents previously produced by Andersen, as well as material originally included in Andersen's July 22 list of documents whose production, Andersen had then said, Swiss law prohibited without additional consents, including, as a "*sine qua non*," the consents of the Swiss Federal Prosecutor and the Geneva prosecutor. As it turned out, more than half of the 30 documents on the July 22 list were eventually produced by Andersen from places not affected by Swiss law, such as Andersen's own Chicago office.

On April 15, 1977, at a further hearing on the matter of sanctions, counsel for Andersen acknowledged for the first time that upon the advice of its Geneva lawyers Andersen had decided to "to take the risk" and had "stepped across the line in terms of Swiss law . . ." *i.e.*, it had produced documents without obtaining the consent of either the Swiss Federal Prosecutor or the Geneva Prosecutor. A description of its "efforts to produce" the Geneva documents, filed by Andersen under court order, showed that in fact Andersen had never attempted to obtain those consents.

On May 23, 1977 the federal district court, finding that "Andersen deliberately and willfully refused discovery for an unreasonable period of time without justification," imposed sanctions under Rule 37.

Declaring that this finding "has overwhelming support in the record," the Tenth Circuit affirmed the district court's decision. *State of Ohio* v. *Arthur Andersen & Co.*, 570 F.2d 1370, 1374 (10th Cir. 1978), *rehearing denied*, March 22, 1978.

ARGUMENT

I. ANDERSEN'S PETITION RESTS WHOLLY UPON RENEWED OBJECTIONS TO THE DISTRICT COURT'S FINDING OF ANDERSEN'S BAD FAITH, A FINDING WHICH THE CIRCUIT COURT UPHELD BASED ON "OVERWHELMING SUPPORT IN THE RECORD"

Part I of Andersen's petition rests upon assertions that the district court and the Tenth Circuit erred with respect to certain findings of fact concerning Andersen's disobedience, in bad faith, of lawful discovery orders:

> "To deny review because of erroneous basic conclusions would emasculate *Societé* [*Internationale* v. *Rogers*, 357 U.S. 197 (1958)] and would enable lower courts to evade review where the principles of *Societé* have been violated by arriving at unsupported conclusions."

(Andersen's Petition, p. 10).

Part II of the petition asserts constitutional error, but this argument, too, is expressly premised upon Andersen's contention that the trial court acted unfairly "in the circumstances of this case." (Andersen's Petition, p. 10). Both contentions, and the petition, fail when set alongside the record.

Addressing the ultimate question whether the trial court erred in finding bad faith on Andersen's part, the Tenth

Circuit held, following its review of a record of approximately 3,000 pages:

> "In its May 23, 1977 order, 75 F.R.D. at 20, the court found that 'Andersen deliberately and willfully refused discovery for an unreasonable period of time without justification.' *The finding has overwhelming support in the record.*" [Emphasis supplied].

570 F.2d at 1374.

Seeking to refute this finding of bad faith, Andersen once again offers its own interpretations and explanations of some of the district court's underlying findings of fact.

Andersen's specific arguments, set forth in Appendices B through F of its petition, were presented to the Tenth Circuit in almost identical wording in Andersen's petition for rehearing. With no member of the Court requesting a poll on the matter, the Tenth Circuit rejected the petition. (The Tenth Circuit's order denying rehearing is printed in Andersen's Supplemental Appendix, S-15.)

Review of three aspects of Andersen's bad faith, which it now tries once again to qualify and explain away, demonstrates that the "explanations" remain unsatisfactory:

1) *Andersen's principal objection to the court's discovery orders, the "foreign law problem," was in fact a part of Andersen's tactics of avoidance.*

Although repeatedly and often stridently asserting to Ohio and to the district court, from the Fall of 1975, its dire jeopardy under Swiss law should the court order production of documents from Andersen's Swiss offices, Andersen did not trouble to begin to determine what documents it maintained there until June 17, 1976, more than seven weeks after the court entered its order compelling discovery, and more than seven months after Andersen first asserted its jeopardy were it to produce the documents. The Tenth Circuit found it "incomprehensible and inexplicable how Andersen could make such representations

when it did not know what the documents contained . . ." 570 F.2d at 1373. Andersen does not deny the accuracy of the factual finding; rather, in Appendix C of its petition, it apparently maintains that because it believed that the district court would deny Ohio's motion to compel, on grounds of a previous discovery cutoff order, it had "no reason" to conduct a file search until it was actually compelled to produce the documents. By itself, this extraordinary argument refutes Andersen's protestations of its own good faith. The argument implies that when a party concludes that it can prevail in opposing certain discovery, the party may declare to its opponent and to a federal court, in unqualified terms, various grave consequences arising out of the production of documents which it has never even attempted to review. Upon this and other grounds, the Tenth Circuit properly found that "Andersen's claims with reference to Swiss law were no more than diversionary tactics." 570 F.2d at 1374.

2) *Andersen's defiance of discovery orders was accompanied by repeated distortion and misrepresentation of important facts.*

In May of 1976, Andersen told the district court, without condition or reservation, that:

> ". . . no amount of consents from private parties would suffice to protect Andersen's personnel from liability to criminal prosecution. *A sine qua non of such protection is the execution of consents or waivers by both the Swiss Federal Prosecutor and the appropriate Cantonal Prosecutors.*" [Emphasis added].

Almost a year later, in April of 1977, Andersen acknowledged that in fact it had been producing the "Geneva documents" without the consent of either the Swiss Federal Prosecutor or of any Cantonal Prosecutor, and that, indeed, it had thus "stepped across the line of Swiss law" upon the *advice* of its own Geneva lawyers. (Andersen's Petition, Appendix D, p. 47). It also finally became clear in

April of 1977 that despite its early insistence upon the absolute necessity for consents of the Swiss Federal and Cantonal Prosecutors, Andersen had never even tried to obtain those consents.

In its Appendix D, Andersen does not dispute any of these facts; instead, Andersen offers its third revised interpretation of them. What it now terms its earlier "reference to the Swiss Prosecutor" (*i.e.* its unconditional statement that the Swiss Prosecutor's consent was a *sine qua non* of Andersen's protection), was merely "an explanation of the Swiss law problems which Andersen believed it then faced." (Andersen's Petition, Appendix D, p. 40). "Upon further consultation with Swiss counsel," Andersen says, it decided that obtaining other required consents would make the risk of prosecution by Swiss officials "remote." (Andersen's Petition, Appendix D, pp. 40-41). Thus, Andersen now declares (this time in conflict with its own counsel's statement to the district court that Andersen had stepped across the line of Swiss law): "In no instance did Andersen produce to Ohio a document located in its office in Geneva, Switzerland without first having obtained the consent or consents required by Swiss law." (Andersen's Petition, Appendix D, p. 41).

Ohio would submit that this particular sequence of unqualified assertions followed by qualifications and revised qualifications tends only to underscore the correctness of the findings and conclusions reached by the courts below concerning Andersen's bad faith.

3) *Andersen's conduct throughout the discovery controversy was characterized by unnecessary delay.*

Not until three hours before a scheduled hearing on sanctions in the district court did Andersen yield one document or supply one item of information whose production had been requested by Ohio and compelled by the court. Among the previously withheld documents then produced by Andersen were 80 newspaper clippings. Andersen has never contended, nor could it, that there were any Swiss

business secrets in those newspaper clippings. Andersen quotes the representation of one of its counsel (Andersen's Petition, Appendix D, p. 47) that the newspaper clippings had to be examined for "notations." But, as the district court found, this excuse was contradicted by a document filed by another of Andersen's lawyers, the lawyer who finally reviewed the "Geneva documents," stating that document by document review of the newspaper clippings had never been necessary. 75 F.R.D. at 18, n. 4.

The strained "explanations" for damaging facts which Andersen offers here are no match for the record which Andersen *made* in the district court.

II. NO NOVEL OR BROADLY APPLICABLE QUESTION IS RAISED BY THE PARTICULAR SANCTIONS IMPOSED UPON ANDERSEN; THESE NECESSARILY DEPEND UPON THE FACTS OF THIS CASE AND ARE JUSTIFIED BY PRINCIPLES WHICH THIS COURT ESTABLISHED IN *SOCIETÉ INTERNATIONALE* v. *ROGERS* AND CONFIRMED IN THE *NATIONAL HOCKEY LEAGUE* CASE

In Part II of its petition, Andersen contends that "in the circumstances of this case," the district court's preclusion sanction denied Andersen due process because the sanction was allegedly entered "not for the purposes of compelling discovery (which had been fully made) or to redress prejudice (which was not established), but solely to punish the defendant and to set an example for others." (Petition, p. 10).

Three questions are implicit in this contention: Was the purpose of the sanctions imposed by the district court only to "punish" or make an example of Andersen? Was Andersen's conduct prejudicial? Was Andersen afforded due process?

Before addressing these questions, it must be noted that the doctrine for which Andersen here argues, as the courts below recognized, would defeat the fundamental purpose of

the Federal Rules "to secure the just, speedy and inexpensive determination of every action." Rule 1, Fed. R. Civ. P. For Rule 37 would be meaningless if an affluent party could defy discovery orders and misrepresent important facts, with the complete confidence that if it eventually "complied," it could buy its immunity from Rule 37 sanctions by, at worst, paying its opponent's attorney's fees. As the district court held:

> "The sanctions imposed are reasonable, necessary and warranted. Anything less would be a mockery of the tenor and spirit of the Federal Rules of Procedure. A lesser penalty would give license to financially able litigants to use court proceedings to hinder and delay litigation to the detriment of *the integrity of the instant suit* and to the orderly progress of other litigation as well." [Emphasis supplied].

75 F.R.D. at 25.

With respect to Andersen's contentions about the purposes of the particular sanctions imposed, the court's reference to "the integrity of the instant suit" is especially significant. The district court's order may have been intended in part to have a punitive effect upon Andersen and a monitory impact upon other litigants. But the court carefully emphasized that an important purpose of the sanctions was to deter *this party,* Arthur Andersen & Co., in order to protect the integrity of *this* ongoing lawsuit.

Thus the court held that it was "inescapable that Andersen has followed a willful, deliberate and flagrant scheme of delay and resistance in discovery matters." 75 F.R.D. at 25. One reason, the court pointed out, why a satisfactory pretrial order was not filed on July 22, 1976 was "because Andersen declined to stipulate to *any* facts as uncontroverted." [Emphasis by the court]. 75 F.R.D. at 17 n. The court noted that Andersen's tardy production of obviously nonprivileged newspaper clippings "is illustrative of its continued attempt to thwart timely discovery." 75 F.R.D.

at 18. The court also observed that as late as April 14, 1977, Andersen had produced several thousand pages of documents which were the subject of a stipulation of discovery entered in January of 1976, conduct not directly related to the "Geneva document" controversy, but "indicative of Andersen's response to the duties of good faith and cooperation imposed under the Federal Rules of Civil Procedure." 75 F.R.D. at 19, n. 5.

Nor does Andersen's assertion that its conduct resulted in no prejudice square with the facts. Expenditure not just of money but of time and attention caused by the need virtually to extract discovery from an unwilling party was prejudicial to Ohio in this case; as the district court held: "We find that the actions of Andersen were without good cause or substantial justification, have inordinately delayed resolution of this litigation, and have resulted in waste of time and unnecessary expense to the State of Ohio." 75 F.R.D. at 15. There was, moreover, prejudice to "other litigants in this case who have had (and continue) to bear the cost and aggravation of countless hearings and delays." 75 F.R.D. at 22. There was prejudice to "other cases delayed because of Andersen's conduct here." *Ibid.* And, not least, the Federal Rules and the judicial system were prejudiced by conduct which deliberately and unnecessarily challenged them both.

This Court has recently had occasion to stress the prejudice caused by defiance of court-ordered discovery. In *National Hockey League* v. *Metropolitan Hockey Club,* 427 U.S. 639 (1976), the trial court had entered the most severe sanction, dismissal, for "failure to timely answer written interrogatories." 427 U.S. at 639. This Court held that even assuming that the sanctioned party would comply with all future orders of that district court, "other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other District Courts." 427 U.S. at 642-643.

In the circumstances of this case, Andersen's vague "due

process'' assertions are without merit. Mr. Justice Harlan's discussion of due process limitations on Rule 37 sanctions in *Societé Internationale* v. *Rogers,* 357 U.S. 197 (1958), was in the context of a dismissal sanction, imposed upon a party who had unquestionably made a good faith effort to comply with a court order. In *Societé*, moreover, a "foreign law" question was at least demonstrable. The Swiss Federal Prosecutor had officially confiscated thousands of the discovered party's documents. In the present case no Swiss official has ever expressed the slightest interest in any of the documents sought by Ohio in any phase of the discovery controversy.

Two hearings on sanctions were conducted by the trial court, in July of 1976 and in April of 1977. 570 F.2d at 1373, 1374. In *Societé* Mr. Justice Harlan declared that "[Rule 37] allows a court all the flexibility it might need in framing an order appropriate to a particular situation . . . the willfulness, or good faith of [the discovered party] can hardly affect the fact of noncompliance and are relevant only to the path which the District Court may follow in dealing with [the party's] failure to comply." 357 U.S. at 208. Here, the district court carefully weighed all such factors and, finding that entry of default judgment would be appropriate, nevertheless chose an even more moderate path than would have been justified by Andersen's disobedience.

III. NO CONFLICT AMONG CIRCUITS IS PRESENTED BY THE CASES ANDERSEN CITES; INDEED, THOSE CASES ARE IRRELEVANT HERE, AND OTHERS WHICH ANDERSEN DOES NOT MENTION STRONGLY SUPPORT THE OPINIONS BELOW

Andersen cites five Second Circuit cases (Petition, p. 6), which it says conflict with the opinions below and require a different result. In fact, only one of those cases, *United States* v. *First National City Bank,* 396 F.2d 897 (2d Cir. 1968), even addresses the matter of Rule 37 sanctions. In

that case, the Second Circuit firmly upholds a civil contempt sanction against a New York bank which failed to comply with a subpoena for production of documents possessed by its branch in Germany. The opinion underscores the trial court's finding of bad faith on the part of the New York bank for failure to examine the records whose production it resisted.

Andersen cites these Second Circuit cases in connection with its assertion that due process requirements were disregarded because the district court's orders allegedly compelled production of documents "without regard to whether such production would violate Swiss law, and then severely sanctioned Andersen for non-compliance with the deadline imposed." (Petition, p. 7). But the district court never indicated disregard of legitimate foreign law considerations; on the contrary, as pointed out above, it suggested, to cite one example, the appointment of an expert on the matter of Swiss law, a suggestion to which Andersen never responded. Nor, certainly, did it sanction Andersen for not producing documents protected by Swiss law. The court specifically identified the discovery order upon which its sanctions were based—"a court order was entered directing Andersen to exert every effort to comply with the discovery requests, and . . . Andersen deliberately and willfully refused discovery for an unreasonable period of time without justification." 75 F.R.D. at 20. Similarly, the court stressed that "the assessment of expenses and fees is not made for Andersen's failure to produce documents when such production would subject it to potential Swiss civil or criminal prosecution. Rather, the assessment is made for Andersen's unjustifiable resistance and delay in adherence to our discovery orders, which, as the passage of time has demonstrated, was totally unwarranted." 75 F.R.D. at 23.

Andersen concludes its petition by asserting that this case should be reviewed in order to "eliminate uncertainty in the wake of *National Hockey League.*" (Petition, p. 15). Although referring generally to "numerous cases" which

have "grappled" with "these questions," Andersen cites no case which indicates any such uncertainty. A predictable reason for this failure may be that no case in fact offers support for the proposition that bad faith violation of court orders must be excused as long as documents are produced at some point. Such contentions have been consistently rejected by federal appellate and district courts.

For example, ten years before *National Hockey League,* in *Diapulse Corp. of America* v. *Curtis Publishing Co.,* 374 F.2d 442, 446 (2d Cir. 1967), the United States Court of Appeals for the Second Circuit upheld the trial court's dismissal of a complaint when requested documents had been tendered for inspection twenty days late. More recently, in *Margoles* v. *Alida Johns and The Journal Company,* unpublished, No. 76-1293, (7th Cir., October 14, 1976), the United States Court of Appeals for the Seventh Circuit affirmed a dismissal of a complaint where, even though a request for production of documents was eventually complied with, "compliance" did not occur until two months after a court-ordered deadline. The Seventh Circuit upheld the dismissal upon the ground that the district court's finding of willful failure was supportable on the record.

In *Perry* v. *Golub,* 74 F.R.D. 360 (N.D. Ala. 1976), the federal district court entered a default judgment against defendants for failure to produce documents in compliance with a court-ordered deadline, despite the fact that at the hearing on sanctions the defendants offered to produce the material. The court observed, "The defendants' eleventh hour offer does not alter the fact that they willfully refused to comply with the court's order." 74 F.R.D. at 365.

Thus, with respect to the important principles underlying the application of Rule 37 sanctions to conduct such as that involved in this case, conduct reflecting "flagrant bad faith," this case creates no conflict among circuits and illustrates no uncertainty. In such circumstances, as shown in the cases cited above, the federal courts have recognized that even the most severe sanction may be appropriate. In

this particular case, Ohio would submit, no question meriting review is presented by this district court's careful and measured response to the attempts of a party to exploit the flexibility of the Federal Rules and the patience and tolerance of the federal court.

CONCLUSION

For these reasons it is respectfully submitted that the petition should be denied.

/s/ Miles M. Gersh

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July 14, 1978

APPENDIX A

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, JULY 2, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
M.D.L. DOCKET NO. MDL 79-1

Civil Action No. C-4628

IN RE: KING RESOURCES COMPANY SECURITIES LITIGATION STATE OF OHIO, Plaintiff, vs. CROFTERS, INC., *et al.*, Defendants.	ORDER 1976-9 ORDER RE PENDING DISCOVERY DISPUTES

THIS MATTER comes before the Court for additional orders on pending discovery matters. The Court, having considered the briefs and statements of counsel and the proposed orders tendered therewith, enters the following orders:

ORDERED — This Court's Order, dated May 27, 1976, which stated: "3) Motion for discovery of certain documents of Andersen & Co. is granted . . ." is hereby withdrawn, and with respect to the discovery sought by plaintiff, Andersen shall proceed in the following manner:

A. *Discovery Sought*:

1. Produce for Inspection and Copying by the Plaintiff State of Ohio the Following:

   (a) Reports of examinations, draft reports, working papers, correspondence and news clipping files in the Geneva office of Arthur Andersen & Co., if any, which reflect the decreasing cash flow and liquidity of IOS, Ltd., Fund of Funds, Ltd. (including its subsidiary F.O.F. Proprietary Funds, Ltd.) during the period from September 1, 1969 through May 31, 1970.

2. Answer The Following Interrogatories Propounded By The Plaintiff State of Ohio And Produce For Inspection And Copying By Ohio The Documents Identified In The Answers To The Questions:

   (a) Did the Geneva office of Arthur Andersen & Co. at any time learn of agreements, negotiations, or any proposed agreements or negotiations to the effect that John M. King, KRC, or the Colorado Corporation, alone or in combination, through loans, stock purchases, or in any other manner, proposed to obtain control, ownership, or partial ownership or control of IOS, Ltd.?

   (b) If the answer to (a) above is other than an unqalified negative:

      (1) On what date did the Geneva office of Arthur Andersen & Co. first learn of such a proposal?

      (2) Please identify the person or persons from whom the Geneva office of Arthur Andersen & Co. first learned of of such a proposal.

(3) Please identify the partners, employees, or other persons associated with the Geneva office of Arthur Andersen & Co. who were the first to learn of such a proposal.

(4) Please identify (and produce for inspection and copying) any and all documents from the Geneva office of Arthur Andersen & Co. reflecting when that office first had knowledge of such a proposal.

(5) What was the nature of any such proposal at the time the Geneva office of Arthur Andersen & Co. first became aware of it?

(6) Did the nature of such proposal change over time?

(7) If the answer to the preceding question is other than an unqualified negative, how did the nature of the proposal change?

(c) If the answer to (a) above is other than an unqualified negative, what audit procedures or other investigatory steps did you use with respect to or in contemplation of such proposal?

(d) With regard to the answer to (c) above:

(1) Please identify (and produce for inspection and copying) all documents from the Geneva office of Arthur Andersen & Co., including, without limitation, books, manuals, or memoranda which treat generally the subject of audit responsibilities, necessary or advisable procedures, investigatory

steps to be taken, or subjects likely to be of concern in conducting audits of enterprises which are contemplating or have entered negotiations with respect to such proposals.

(2) Please identify (and produce for inspection and copying) every document from the Geneva office of Arthur Andersen & Co. relating to audit procedures or other investigatory steps taken by that office with respect to such proposal.

(3) Please identify each partner or employee of the Geneva office of Arthur Andersen & Co. who participated in audit procedures or other investigatory steps with respect to or related to such proposal.

(4) Please identify all individuals at KRC, Investors Overseas Services, or affiliated entities who were contacted by the Geneva office of Arthur Andersen & Co. in the course of employing audit procedures or other investigatory steps with respect to such proposal.

B. *Procedure to Be Followed by Arthur Andersen & Co.*

1. Cause to be concluded the search presently being conducted of the files of Arthur Andersen & Co. located at Geneva, Switzerland that may contain documents responsive to the above request for production of documents and answers to the above interrogatories, and segregate such documents.

2. On or before July 12, 1976, produce to plaintiff for inspection and copying at any of Andersen's offices

in the United States, the documents and information requested. *However,* with respect to any documents or information the release of which defendant believes would subject it to civil or criminal liability under Swiss law, defendant shall, by July 12, 1976:

(i) Exert every effort to obtain the release of such documents or information, through obtaining consents or waivers which may be necessary to comply with this Order and with Swiss law;

(ii) Identify any document (by type of document, subject and title of document, author, addressee, date) or information (by subject matter and source) which has not been produced; state with specificity the grounds including what efforts have been made to effect production, and what efforts are planned to be made.

(iii) Deliver to the Court all documents identified in (ii) above, organized and catalogued in such form that if this Court determines that some or all of such documents must be produced, based on this Court's evaluation both of the reasons given by Andersen for non-production and of efforts exerted by Andersen to effect production, any such documents may be made available without further delay for inspection and copying by plaintiff State of Ohio.

3. On or before July 16, 1976, counsel for Ohio and Arthur Andersen are directed to meet in an effort to resolve differences respecting any documents or data which have not by that date been produced by Arthur Andersen. Only upon conclusion of such meeting may the parties take such further steps as may be appropriate under the federal rules.

• • •

IT IS FURTHER ORDERED that there will be no interlocutory appeals from discovery orders in this case and the Court will summarily deny applications for same. *Paramount Film Distributing Corp. v. Ritter,* 333 F.2d 358 (10th Cir. 1964); *see also Denson v. Brown,* No. 74-8075 (10th Cir., July 29, 1974 (Appendix No. 13) (Unpublished Opinion).

FURTHER, the Court expressly orders that if, upon *in camera* inspection of the documents subject to claims of attorney-client or foreign law privilege, it appears that such claims were made frivolously or without good faith, the Court will impose sanctions.

DATED at Denver, Colorado, this 2 day of July, 1976.

BY THE COURT:

/s/ Sherman G. Finesilver
SHERMAN G. FINESILVER, Judge
United States District Court

APPENDIX B

ONE OF DOCUMENTS EDITED BY ANDERSEN BEFORE PRODUCTION TO OHIO, PRODUCED ON AUGUST 13, 1976

Remarks concerning I.O.S., Ltd. ANQ 12-31-69

1976-12

(21)

Comments concerning discussions with officers -

Finally, we had discussions with John King and his representatives.

1976-12